U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMIE MASON and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

Docket No. 98-1665; Oral Argument Held June 3, 1999;
Issued September 7, 1999

Appearances: *Jimmie Mason , pro se*; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's requests for reconsideration on June 10, 1997 and January 26, 1998, as the requests for reconsideration were untimely filed and did not demonstrate clear evidence of error; and (2) whether the Office properly denied appellant's request for a hearing on August 20, 1997.

This is the 10th appeal of this case.[1] In the first appeal,[2] the Board, by decision dated October 20, 1980, set aside an April 16, 1980 decision of the Office and remanded the case for resolution of a conflict in medical opinion regarding whether appellant had any disabling residuals causally related to his October 22, 1959 employment injury. In the sixth appeal,[3] the Board conducted its last *de novo* review of this case and by decision dated December 12, 1990, affirmed Office decisions dated July 19, 1989 and April 12, 1990 which denied modification of the prior termination of appellant's compensation benefits, after merit review. In the ninth appeal,[4] the Board found that appellant's requests for reconsideration dated August 22 and October 24, 1994, were untimely filed and did not demonstrate clear evidence of error. The Board also found that the Branch of Hearings and Review lacked jurisdiction to exercise its discretionary appellate authority to grant appellant a hearing, and that the Office had therefore properly denied appellant's request for hearing on September 12, 1994. The facts and

[1] On October 22, 1959 appellant, then a 27-year-old postal clerk, sustained a back injury which the Office accepted for chronic lumbosacral strain. Appellant received compensation benefits for temporary total and partial disability until April 8, 1981. Appellant sustained a second employment-related lumbar strain in 1973.

[2] Docket No. 80-1120 (issued October 20, 1980).

[3] Docket No. 90-1023 (issued December 12, 1990).

[4] Docket No. 95-1439 (issued May 7, 1996).

circumstances surrounding the prior appeals are more fully set forth in the Board's prior decisions which are hereby incorporated by reference.

Following the Board's last decision on May 7, 1996, appellant requested that the Office reconsider his case on February 27, 1997. In support of this request for reconsideration, appellant submitted hospital records from the St. Louis University Health Science Center regarding a lumbar fusion and decompression performed on October 14, 1996, a percutaneous radio frequency rhizotomy of the left L2-4 performed on June 20, 1996, and records concerning several trigger point and epidural steroid facet joint blocks performed from February 14 to June 14, 1996. By decision dated June 10, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error.

On July 14, 1997 appellant requested a hearing before an Office hearing representative. By decision dated August 20, 1997, the Office's Branch of Hearings and Review denied appellant's request for hearing. The Branch of Hearings and Review found that as appellant had previously requested reconsideration he was not, as a matter of right, entitled to an oral hearing on the same issue. The Branch of Hearings and Review also noted that in its discretion, it had carefully considered appellant's request and had determined that his request could be equally well addressed by requesting reconsideration from the Office and submitting evidence not previously considered which established that the Office's final merit decision was erroneous.

On December 26, 1997 appellant again requested that the Office reconsider his case. With his request for reconsideration appellant submitted a number of medical reports dating from 1973, which were previously of record. Appellant essentially argued that if the Office's prior determination that his condition after 1980 was due to multiple sclerosis was correct, he would not have required steroid injections to the lumbar spine and spinal surgery during 1996.[5]

By decision January 26, 1998, the Office denied appellant's request for review. The Office found that as the request for review was not filed within one year of the last merit decision, the request was untimely filed. The Office also found that appellant's request for reconsideration did not demonstrate clear evidence of error and therefore merit review was not required.

The Board finds that the Office properly denied appellant's requests for reconsideration dated February 27 and December 26, 1997 on the grounds that they were untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[6] does not entitle a claimant to a review of an Office decision as a matter of right. This section, vesting the Office

[5] Appellant also argued that he was not aware of the Office's one-year time limitation for requesting reconsideration until November 1997. Appellant has previously made this argument on appeal. This issue was addressed by the Board's decision dated May 7, 1996 wherein, in footnote 23, the Board noted:

> "On appeal appellant alleges that he was not informed by the Office that a request for reconsideration must be made within one year of a final decision. The record indicates that appellant was apprised of the year requirement on numerous occasions, included by the appeal rights which accompanied the April 12, 1990 decision."

[6] 5 U.S.C. § 8128(a).

with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[7] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[9] The Office issued its last merit decision in this case on April 12, 1990 wherein it denied modification of the termination of appellant's compensation. The Board thereafter reviewed this decision on December 12, 1990 and affirmed the Office's decision. The Board's December 12, 1990 review constitutes the last merit decision in this case.

As appellant's reconsideration requests at issue here were outside the one-year time limit which began on December 12, 1990, the date of the last merit decision, appellant's requests for reconsideration were untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[10] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and

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[7] 20 C.F.R. § 10.138(b)(2).

[8] *Jesus D. Sanchez,* 41 ECAB 964 (1990); *Leon D. Faidley, Jr.,* 41 ECAB 104 (1989).

[9] *Larry L. Lilton,* 44 ECAB 243 (1992).

[10] *Gregory Griffin,* 41 ECAB 186 (1989); *petition for recon. denied,* 41 ECAB 458 (1990).

[11] *See Dean D. Beets,* 43 ECAB 1153 (1992).

must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[14] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[15] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review on the face of such evidence.[16]

The Board finds that appellant's requests for reconsideration fail to show clear evidence of error. The last merit decision issued by the Office denied modification of the termination of appellant's compensation benefits. The issue for purposes of establishing clear evidence of error is whether appellant has established that the Office erred in terminating his compensation benefits in 1980 as he had continuing disability causally related to the accepted injury. Appellant has submitted additional medical evidence that he underwent lumbar steroid and epidural block injections as well as lumbar surgical procedures during 1996. These reports are not the positive, precise and explicit evidence necessary to establish appellant's claim. The term 'clear evidence of error' is intended to represent a difficult standard, and appellant must present evidence which on its face shows that the Office made an error. The additional medical reports simply note appellant's history of injury and his current diagnosis. None of the new medical reports of record, which substantiate invasive lumbar procedures performed in 1996, specifically address the question at hand, that is whether appellant was disabled after 1980 causally related to his 1959 lumbar strain injury, or his 1973 lumbar strain.

Furthermore, while appellant argues that his 1996 surgical procedures prove that his condition in 1980 was not due to multiple sclerosis, appellant has not offered any medical opinion which offers this opinion. Obviously, appellant could have had multiple sclerosis in 1980 and also could have developed a back condition which required surgery and other procedures in 1996. Neither the Office nor the Board may properly speculate based upon appellant's belief alone, without proper medical opinion, that a surgical procedure performed in 1996 would preclude a diagnosis made at least 16 years prior of multiple sclerosis. The Board therefore finds that the Office properly concluded that appellant's requests for reconsideration dated February 27 and December 26, 1997 did not present clear evidence of error.

[12] *See Leona N. Travis,* 43 ECAB 227 (1991).

[13] *Id.*

[14] *See Nelson T. Thompson,* 43 ECAB 919 (1992).

[15] *Leon D. Faidley Jr., supra* note 8.

[16] *Gregory Griffin, supra* note 10.

The Board also finds that the Office's August 20, 1997 denial of appellant's request for a hearing must be affirmed.

The statutory right to a hearing under section 8124(b)(1) of the Federal Employees' Compensation Act[17] follows an initial decision of the Office on the merits of the claim. Section 8124 (a) of the Act sets forth the Office's original jurisdiction in the adjudication of a claim as follows:

> "(a) The Secretary of Labor shall determine and make a finding of facts and make an award for or against the payment of compensation under this subchapter after --
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> > (1) considering the claim presented by the beneficiary and the report furnished by the immediate superior; and
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> > (2) completing such investigation as he considers necessary."

The statutory right to a hearing under section 8124(b)(1) of the Act follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows:

> "(b)(1) *Before review under section 8128(a)* of this title, a claimant for compensation not satisfied *with a decision of the Secretary under subsection (a) of this section* is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary...." (Emphasis added.)

The Act thus provides the Office with original jurisdiction in the processing of compensation claims, and section 8124(a) specifically provides the Office with the duty and authority to issue an initial decision on an employee's claim for compensation. Once an initial decision is made in a compensation case, appellate rights arise by which the employee may seek further review of his claim: the right to a hearing before the Office (section 8124(b)(1)), the right to reconsideration before the Office (section 8128(a)) or an appeal to the Board (section 8149).

In applying section 8124(b)(1) of the Act, the Board has held that the Branch of Hearings and Review also has the discretionary authority to grant hearings in certain circumstances where no legal provision was made for such hearing.[18] In *Eileen A. Nelson,*[19] the Board explained that the Branch of Hearings and Review does not, however, have the discretionary authority to grant a hearing any time it is requested to do so by a claimant. The Board stated in *Nelson* that the Branch may not assume jurisdiction in the claims process absent a final adverse decision by the Director which has not previously been reviewed by the Board. In *Nelson*, immediately following an appeal to the Board, appellant requested a hearing before an Office hearing representative.

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[17] 5 U.S.C. § 8124.

[18] *Herbert C. Holley,* 33 ECAB 140 (1981).

[19] 46 ECAB 377 (1994).

In the present case, after the Board's decision dated May 7, 1996, appellant requested that the Office reconsider his case and the Office denied appellant's request for reconsideration on June 10, 1997 as untimely filed and lacking clear evidence of error. While unlike the *Nelson* case, the Office did issue a decision following the Board's last review of this case, this nonmerit decision by the Office did not renew the Office's discretionary authority to grant a hearing as no discretion previously existed. Appellant had no entitlement to a hearing following the Board's review of the claim. As the Office's June 10, 1997 decision following the Board's review was not a merit decision, there was no basis for exercise of discretion by the Branch of Hearings and Review in this case. As there was no final merit decision of the Office left unreviewed over which the Branch of Hearings and Review could assume jurisdiction to exercise its discretionary appellate authority, the Office was required to deny appellant's request for hearing on August 20, 1997.

The decisions of the Office of Workers' Compensation Programs dated January 26, 1998, August 20 and June 10, 1997 are hereby affirmed.

Dated, Washington, D.C.
September 7, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member